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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

AKILI WALKER,

Defendant and Appellant.

B290243

(Los Angeles County
Super. Ct. No. MA071648)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shannon Knight, Judge. Affirmed and remanded with directions.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found Akili Walker (appellant) guilty of assault with a firearm, criminal threats, possession of a firearm by a felon, and unlawful possession of ammunition. The trial court sentenced appellant to 16 years four months in prison. Appellant's sentence included a mandatory consecutive five years because appellant had a prior serious felony conviction. (Pen. Code, § 667, subd. (a)(1).)¹ In 2018, section 667 was amended to give trial courts discretion whether to impose the previously-mandatory five-year sentence. (Stats. 2018, ch. 1013, § 1.) Appellant argues the trial court should be permitted to exercise its discretion under the new amendment. Respondent concedes a limited remand is appropriate for that purpose. We agree as well. Thus, we remand for the trial court to exercise discretion whether to impose the five-year consecutive sentence pursuant to section 667, subdivision (a)(1).

Appellant also asks us to vacate his fees and assessments pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). Appellant did not raise the issue at trial and his case is factually different from *Dueñas*. Therefore, we find the *Dueñas* argument both forfeited and without merit.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant owned an auto shop where he sold used cars and repaired cars. The victim and appellant were acquaintances and appellant agreed to sell victim's 1992 automobile. It is unclear from the record what price the victim and appellant agreed upon. The victim stated he believed he would receive either \$1,000 or

¹ All further statutory references are to the California Penal Code unless otherwise stated.

\$500 for the car. Appellant did not pay the victim in a timely manner after receiving the car. Once a week from February until July 2017, the victim went by appellant's shop to request the money he was owed. Appellant initially told the victim he had not sold the car yet. Later, the victim testified he had already been given \$300 "so I want the rest of my money." Appellant then told the victim he did not have any money at the moment. Appellant eventually had his wife give the victim \$50 to increase the total to \$350. Appellant testified his wife gave the victim \$50 on two occasions, for a total of \$400.

The incident occurred on July 7, 2017. The victim went to appellant's auto shop and asked for the unpaid \$150. Appellant stated he had just made \$50 and asked if the victim wanted it. When the victim said he was owed \$150, appellant denied owing him \$150, stating he did not make any money off the car because he sold it for \$300. At this point the men began to argue because the victim believed appellant had more money. Appellant told the victim they would have to fight over the money. The victim replied he did not wish to fight. Appellant then went over to a filing cabinet and removed a gun from one of the drawers. The victim testified appellant said "I'll blow your damn head off" and/or "I'll kill you," after which appellant pushed the victim, telling him to get out of his shop. The victim said appellant never pointed the gun at him, and that he had it at his side down by his hip.

The victim left the shop and drove to the police station to file a report. Officers arrived at the shop and found a loaded handgun and loose ammunition in the filing cabinet.

Appellant was sentenced to a total prison sentence of 16 years four months. Included in this sentence was a

consecutive five years mandated by appellant's prior serious felony conviction. (§ 667, subd. (a)(1)). The court imposed and stayed a \$2,000 parole/supervision revocation fine. The court also imposed a \$2,000 victim restitution fund fine, a \$30 criminal conviction facility assessment, and a \$40 court security fee. After imposing sentence, the court addressed appellant: "Mr. Walker, again, I mean, obviously, you've got a lot of redeeming qualities. You've been a perfect gentleman since you've been here. I have to follow the law, and based on what I see, this was the sentence, but certainly you've got a lot to look forward to when you get out, sir and I hope that – you know, I hope that in the future you will not run into these problems again, and I wish you the best of luck."

Appellant timely appealed.

DISCUSSION

A. *Remand is appropriate to permit the trial court to exercise discretion to strike the prior serious felony conviction enhancement imposed under section 667 subdivision (a)(1).*

Appellant was sentenced on May 18, 2018. On May 18, 2018, section 667 subdivision (a)(1) stated in full:

"Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

At the same time, former section 1385, subdivision (b) read: “This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under section 667.” Thus, the trial court had no discretion to apply or disregard the five-year enhancement in section 667 subdivision (a)(1).

However, on September 30, 2018, the Governor signed Senate Bill No. 1393 (2017–2018 Reg. Sess.), which went into effect on January 1, 2019. (Stats. 2018, ch. 1013, §1.) Senate Bill No. 1393 altered former section 1385, subdivision (b), by “delet[ing] the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of the 5-year enhancement.” (Legis. Counsel’s Dig., Sen. Bill No. 1393 (2017-2018 Reg. Sess.) p.1.) Thus, the change in law gives a trial court the discretion to strike the five-year enhancement for a prior serious felony conviction.

Here, appellant had a 33-year-old prior felony conviction which triggered the five-year enhancement under section 667(a)(1). Absent evidence to the contrary, a legislative body intends for statutes reducing punishments for specific crimes to apply as broadly as possible, distinguishing only between cases which are final and not yet final. (*In re Estrada* (1965) 63 Cal.2d 748.) Here the legislature did not expressly state Senate Bill No. 1393 was not to be applied retroactively. Because Senate Bill No. 1393 has taken effect and the judgment in appellant’s case is not yet final, the law applies retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972–973 (*Garcia*) [under the *Estrada* rule it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill No. 1393

to apply to all cases not yet final when Senate Bill No. 1393 became effective on January 1, 2019].)

Respondent concedes this point and we agree. Therefore, appellant is entitled to a new sentencing hearing where the trial court may exercise its discretion to strike or impose the enhancement under section 667, subdivision (a)(1). In addition, the trial court has discretion to strike only the punishment for the enhancement. We express no opinion on how the trial court should rule.

B. *The fines, fees, and assessments should not be vacated or stayed because appellant did not raise the issue in the trial court and his claim is distinguishable from the claim in Dueñas.*

Appellant contends his fines, fees, and assessment should be vacated because the trial court failed to hold a hearing on his ability to pay. We disagree. Appellant has forfeited this contention by failing to interpose an objection in the trial court. In addition, the factual record here is unlike the facts presented in *Dueñas*.

1. The record in *Dueñas*

Dueñas pleaded no contest to a misdemeanor charge of driving with a suspended license. (*Dueñas, supra*, 30 Cal.App.5th at p. 1161.) *Dueñas* had three prior juvenile adjudications with unpaid fees totaling \$1,088. (*Ibid.*) She was unable to reinstate her driver's license because of her inability to pay the fees. (*Ibid.*) In the next three years *Dueñas* sustained three misdemeanor convictions for driving with a suspended license and one conviction for failing to appear. (*Ibid.*) When offered the choice of paying the fines or serving jail time, *Dueñas* served jail time because she could not afford the fines. (*Ibid.*)

She could not afford the fines because she was an unemployed high school drop-out afflicted with cerebral palsy and a mother of two young children. (*Dueñas, supra*, 30 Cal.App.5th at p. 1160.) Her husband was able to find part-time work only. (*Ibid.*) The Dueñas family received \$999 per month from California in cash benefits and food stamps. (*Id.* at p. 1161.) The family was homeless and spent time between the children’s grandmothers’ houses where the electricity was cut off because they could not afford to pay the bill. (*Ibid.*)

After pleading no contest to the current charge Dueñas accepted a conversion of the \$300 fine to nine days in county jail because she “ ‘doesn’t have the ability to pay.’ ” (*Dueñas, supra*, 30 Cal.App.5th at p. 1162.) Dueñas then asked the court to “set a hearing to determine her ability to pay ‘the attorney fees . . . and court fees’ she had previously been assessed. (*Ibid.*) After the court denied this request, “Dueñas again asked the court to conduct an ability to pay hearing.” The trial court granted the request. (*Ibid.*)

At the hearing, the court waived the attorney fees based on her indigence. However, the court determined the “court facilities assessment” and the “court operations assessment” were mandatory. (*Dueñas, supra*, 30 Cal.App.5th at p. 1163.) The court also held Dueñas had “not shown the ‘compelling and extraordinary reasons’ required by statute” to waive the restitution fine. (*Ibid.*) The court told Dueñas “ ‘[i]f in the end you’re not able to pay, you won’t be punished for it. Those [sums] will go to collections without any further order from this court.’ ” (*Ibid.*)

The Court of Appeal reversed, holding due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments. In addition, the court directed the trial court to stay the restitution fine unless and until the People proved that Duenas had the present ability to pay it. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1168-1169, 1172.)

2. The issue is forfeited because appellant did not raise the issue in the trial court.

Appellant raises a *Dueñas* issue in his supplemental briefing. He concedes he did not object to the fines, fees, or assessments in the trial court. Therefore, he has forfeited this argument. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 [The issue is forfeited where there was no objection raised in the trial court to the imposition of the court operation assessment, criminal conviction assessment and restitution fines.])

3. The record in this case is unlike *Dueñas*.

This case is distinguishable from *Dueñas*. Unlike *Dueñas*, the record here does not “illustrate[] the cascading consequences of imposing fines and assessments that a defendant cannot pay.” (*Dueñas, supra*, 30 Cal.App.5th at p. 1163.) Nor does appellant's case stem from a “series of criminal proceedings driven by, and contributing to, [his] poverty.” (*Id.* at p. 1164.)

Here, the record indicates appellant ran an auto shop in which he fixed and sold cars. Appellant had a fiancée with two children who lived at his own home. Appellant was also able to give the victim \$300 for a flight to Texas and another \$50 when the victim returned. He operated his own business, supported a

family, and earned an income. The record here does not support the theory appellant cannot afford to pay the fines, fees, and assessments imposed on him.

DISPOSITION

The matter is remanded to the trial court with directions to exercise its discretion whether to resentence appellant, pursuant to sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393.

The judgment is affirmed in all other respects.

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STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.